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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF OHIO IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST

Amici Curiae submit this brief in support of Petitioner New York State Department of Labor urging that this Court grant certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above action on November 29, 1989, in order to protect and preserve the respective prevailing wage laws of the amici states represented herein.

At issue is the prevailing wage law of New York, Labor Law §220, which requires the payment of the prevailing wage rate and supplemental rate to each employee on a public work project. The United States District Court for the Southern District of New York held that Labor Law §220 was not preempted by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§1001 *et seq.*, while the United States Court of Appeals for the Second Circuit (Court of Appeals) reversed and held that the provisions of Labor Law §220 were preempted. The amici states represented herein also have prevailing wage statutes and their respective state statutes are threatened by the ruling of the Court of Appeals.

During the depression era, many state legislatures began enacting laws "to establish a fair rate of wages to be paid to workmen and mechanics employed in construction of public improvements." Ohio Rev. Code Ann. §4115.03 *et seq.* (Page 1978). The legislative intent of the acts was simple: to provide a comprehensive uniform framework for workers' rights and remedies vis-a-vis private contractors, subcontractors and materialmen engaged in the construction of public improvements of the state.

A number of states, including New York, have enacted laws that require public work project contractors to pay a prevailing wage to its employees. A majority of these state prevailing wage laws recognize fringe benefits in determining

prevailing wages.[1] To determine that ERISA preempts these state prevailing wage laws prevents a state from providing equal opportunities to public work contractors, protecting the living standards of public work project employees and keeping the local economy free from disturbance.

The resolution of the issues presented in this case will have a substantial impact upon the continued protection of employees and contractors who work on public work projects, and on the economy of the locality of the public work project under construction. This protection currently exists through the enforcement of the states' prevailing wage laws, including those of the amici states herein. Like Labor Law §220, the amici states have enforcement provisions within their respective prevailing wage laws which recognize an employer's contribution to an employee benefit plan in determining the total compensation package received by an employee on a public work project. Neither Labor Law §220 nor the prevailing wage laws of the amici states require that employers establish, contribute to or otherwise maintain an employee benefit plan to comply with the prevailing wage requirements. Notwithstanding this absence of state regulation of employee benefit plans, the Court of Appeals found Labor Law §220 to be preempted by ERISA. Said

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[1] Alaska, Alaska Stat. §36.05.010(7)(1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen.Stat. §31-53 (1987);Hawaii, Haw. Rev. Stat. §§104-1 (1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 39S-2 (Smith-Hurd 1986); Kansas, Kans. Stat. Ann. §44-201; Kentucky, Ky. Rev. Stat. §337.505 (Baldwin 1982); Maryland, Md. Stat. Fin. & Proc.Code Ann., §17-208(1988); Massachusetts, Mass. Gen. Laws Ann. Ch. 149, § 27 (West 1982); Michigan, Mich. Comp. Laws §408.552 (1985); Minnesota, Minn. Stat. Ann. §177.42 (West 1989); Missouri, Mo. Rev. Stat. §290.210-345 (Vernon 1989); Montana, Mont. Code Ann. §18-2-403 (1989); Nevada, Nev. Rev. Stat. §§338-010-338-130 (1989); New Mexico, N.M. Stat. Ann. §13-4-11 et seq. (1953); Ohio, Ohio Rev. Code Ann. 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40 §1961 (West 1980); Oregon, Or. Rev. Stat. §279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43 §165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws §§37-13-4-37-13-14(1984); Texas, Texas Lab. Code Ann. §5159a (Vernon 1987); Washington, Wash. Rev. Code Ann. §39.12.010 (1972); Wisconsin, Wis. Stat. Ann. §103.39 (West 1988); Wyoming, Wyo. Stat. §27-4-405 (1977).

decision will have a strong and adverse impact upon the continued enforcement of state prevailing wage laws; therefore, the amici states represented herein respectfully request this Court to grant certiorari in order to resolve these issues and concerns regarding Labor Law §220.

SUMMARY OF ARGUMENT

New York's prevailing wage law, Labor Law §220, which requires a minimum rate of pay to employees on state public work projects, is not preempted by ERISA. ERISA preempts state laws which regulate, directly or indirectly, employee benefit plans covered by ERISA. This Court has held that those state laws which affect ERISA covered employee benefit plans in too remote, tenuous or peripheral a manner are not preempted under ERISA. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983).

Labor Law §220 does not directly or indirectly regulate employee benefit plans. Labor Law §220, like the prevailing wage laws of many other states, takes into consideration an employer's contribution to employee benefit plans in calculating the prevailing rate of wages. There is no mechanism within Labor Law §220 which would permit the state to regulate employee benefit plans covered by ERISA. Further, the employer retains control over the selection and administration of employee benefit plans.

The majority in the decision below overstated the impact of the ERISA preemption clause and departed from previous federal court decisions in the area of ERISA preemption. The majority decision nullifies the power of the State of New York to address a legitimate local need, and this decision threatens the ability of many other states to also address legitimate local needs and concerns. The decision of the court below has far-reaching effects upon state laws which were never intended by Congress when it enacted ERISA. For these reasons, Amici Curiae respectfully request that this Court grant certiorari so that these far-reaching effects of the majority decision below are reviewed and ultimately avoided.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS DECISION THAT LABOR LAW §220 IS PREEMPTED BY ERISA UNDERMINES THE PURPOSE AND EFFECT OF NEW YORK'S PREVAILING WAGE LAW AND JEOPARDIZES THE EFFECTIVENESS OF THE PREVAILING WAGE LAWS OF MANY OTHER STATES.

New York Labor Law §220 mandates a prevailing wage rate and does not directly or indirectly regulate employee benefit plans. The effect, if any, of Labor Law §220 on employee benefit plans is "too tenuous, remote or peripheral" to be preempted by ERISA." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21. (1983) Labor Law §220 does not require that contractors on public work projects establish, maintain or contribute to employee benefit plans. Any administration of an employee benefit plan is strictly within the control of the employer. Indeed, there is no mechanism within New York's prevailing wage law which would permit the state to regulate the structuring, funding or administration of these plans. The majority in the decision below misinterpreted and overstated the requirements of Labor Law §220. This misinterpretation severely damages the effectiveness of New York's prevailing wage law, and threatens similar laws of many states, including those of the amici states represented herein.

Labor Law §220 and the prevailing wage laws of the amici states herein were originally enacted without a provision for the recognition of employer contributions to employee benefit plans.[2] The undesirable result was an imbalance where those employers who provided valued fringe benefits, such as medical coverage, were penalized for not compensating their employees at a higher cash rate of pay. To correct this imbalance, and to equalize competition among contractors

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[2] With the exception of Pennsylvania, which enacted its prevailing wage law in 1961.

bidding on state projects, states amended their prevailing wage statutes to include provisions for the recognition of the value of certain fringe benefits provided by contractors to their employees.

Indeed, Congress found it necessary to include fringe benefits in the determination of the prevailing wage by amending the federal prevailing wage statute, 40 U.S.C. Section 276a, et seq. (Davis-Bacon Act)[3] :

> The amendments to the Davis-Bacon Act proposed by H.R. 6041 would bring up to date the Davis-Bacon Act by including fringe benefits in prevailing wage determinations. There has been a tremendous change in the concept of earnings since Congress enacted the Davis-Bacon Act. Group hospitalization, disability benefits, and other fringe benefits plans were the rare exception in the 1930's. Today more than 85 million persons in the United States depend upon the benefits they provide. Regardless of the form they take, the employer's share of the cost of these plans or the benefits the employers provide are a form of compensation. It has become increasingly apparent that if the Davis-Bacon Act is to continue to accomplish its purpose, prevailing wage determinations issued pursuant to the act must be enlarged to include fringe benefits. The act was founded on the sound principle of public policy that the Federal Government should not be a party to the destruction of prevailing wage practices and customs in a locality. Unless the law is amended to provide for the inclusion of fringe benefits in wage determinations, prevailing wage practices and customs will not be reflected in these determinations.

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[3] Public Law 88-349, Section 1 amended 40 U.S.C. 276a by adding a new subsection (b).

H.R. Rep. No. 308, *Amendments to the Davis-Bacon Act*, 88th Cong., 1st Sess., 2-3 (1963).

The State of New York and the amici states have a strong interest in the continued recognition of an employer's contribution to an employee benefit plan. If the State of New York or any other state with a prevailing wage law is no longer empowered to recognize the value of these contributions, an imbalance in the competitive bidding process would reappear. Those employers who would continue to provide benefits to employees would be at a competitive disadvantage in the bidding process.

Under Labor Law §220, the value of the employer's contribution to an employee benefit plan is credited toward the total compensation received by the employee while employed on a public project. The total compensation package received by the employee must be at least equivalent to the prevailing rate of wages and the prevailing supplemental rate.

Labor Law §220 states, in pertinent part:

> With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the following manner. The amount of such supplement shall be the one provided to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation provided with the same amount, then the amount provided to the greater number in such trade or occupation shall be the prevailing practice with respect to the amount of such supplement . . .

Under Labor Law §220, the employer is free to chose the method by which he can discharge his duty to pay the prevailing rate of wages and the supplemental rate. The majority in the decision below, as the dissent accurately

notes, overstated the impact of the supplemental rate requirement when it held that Labor Law §220 prescribed the type, nature and amount of the benefits to be provided by the employer. The fiscal officer annually determines the prevailing wage and supplemental rates: a decision necessary for the preservation of local prevailing wages and customs.[4] It is important to note that the fiscal officer does not control ERISA plans.

Under Labor Law §220, the employer retains total control over employee benefit plans. The employer may choose to provide an equivalent benefit package to the employees on the project, or the employer may choose to provide a full cash payment in lieu of a benefit package. The employer also has the option of providing a combination of both:

> When employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits or by providing an equivalent benefits plan, or by a combination of benefits and cash equal to the cost of the prevailing benefits.

Action Electrical Contractors Company v. Goldin 64 N.Y. 2d 213, 221-22, (1984) (The New York State Court of Appeals held that an employer is not required to satisfy the supplemental rate obligation by providing in-kind benefit plans.)

The type and amount of the contributions the employer makes, as well as the full administration of the plan, are within the control of the employer. There is nothing in the language of Labor Law §220 which prescribes the terms or conditions of an employee benefit plan freely selected by the employer.

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[4] As noted in Petitioners' Petition for Certiorari, the fiscal officer is the Commissioner of Labor for all public works projects outside of New York City. In New York City, the fiscal officer is the city comptroller. §220(5)(b).

In *Shaw, supra*, this Court found that a New York state law mandating certain disability benefits, which was not otherwise preempted by ERISA, did not become preempted by ERISA simply because the state law permitted ERISA plans to provide the mandated benefit. The mandate of a prevailing wage by New York will not, in and of itself, be preempted by ERISA. See, *Massachusetts v. Morash*, ____ U.S. ____, 109 S.Ct. 1668 (1989)(State law regarding payment of accured vacation time not preempted by ERISA). Based on this Court's analysis in *Shaw, supra*, and *Morash, supra*, the fact that New York's prevailing wage law permits public work contractors to offset their wage requirements with the contractors' costs of providing certain ERISA-covered benefits does not cause ERISA to preempt New York's prevailing wage law.

In *Aetna Life Insurance Company v. Borges*, 869 F.2d 142, (2nd Cir. 1989), the Second Circuit Court of Appeals reviewed a Connecticut escheat law requiring that drafts for employee benefits which remained uncollected for three years or more revert to the state treasurer. The court noted that although the escheat law impacted on employee benefit plans, the effect on the plans was too tenuous and remote to warrant ERISA preemption. The court stated:

> What triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefit plans, such as determining an employee's eligibility for a benefit and the amount of that benefit.

Id. at 146-147 (2nd Cir. 1989).

In *Rebaldo v. Cuomo*, 749 F.2d 133 (2nd Cir. 1984), the Second Circuit Court of Appeals held that state regulation of hospital costs and rates are not preempted by ERISA even though the regulation increases the costs of maintaining employee benefit plans. The court wisely recognized that ERISA does not preempt every state law that incidentally touches upon an employee benefit plan. In the instant case,

the majority in the Court of Appeals rejected its own wisdom by extending ERISA preemption to state laws which only incidentally touch upon employee benefit plans. If permitted to stand, this result will have damaging consequences to a variety of state laws in many different areas of state regulation.

The majority in the decision below, in reasoning that Labor Law §220 is preempted by ERISA, mistakenly relies upon inapposite case authority which preempted state laws *requiring* employee benefit contributions. The state laws examined in *Local Union 598, Plumbers and Pipefitters Industry Journeymen and Apprentices Training Fund v. J.A. Jones Construction Co.*, 846 F.2d 1213 (9th Cir. 1988), and *Stone v. Webster Engineering Corporation*, 690 F.2d 323 (2nd Cir. 1982), were in complete contrast to Labor Law §220 and the prevailing wage laws of the amici states. The majority in the decision below failed to acknowledge that there is no provision in Labor Law §220 requiring an employer's contribution to any particular employee benefit plan. The dissent correctly notes that the majority "breaks stride" with the previous decisions of the court in the area of ERISA preemption. The dissent properly states that *Aetna Life, supra*, and *Rebaldo, supra*, should be followed as they discuss state statutes which are more similar to the prevailing wage law in issue here. 891 F.2d 25, 31 (2nd Cir. 1989).

If the negligible effect of Labor Law §220 on the administrative procedures of maintaining an employee benefit plan, freely chosen and administered by the employer, is sufficient to preempt New York's prevailing wage law, then certainly many other state laws will be called into question. In *Lane v. Goren*, 743 F.2d 1337 (9th Cir. 1984), the court, in reviewing whether ERISA preempts state regulations which merely increase the costs of maintaining employee benefit plans, held:

> That argument [that the state regulation is preempted] does not withstand scrutiny. So too, for example, do state laws and municipal ordinances regulating zoning, health, and safety

> increase the operational costs of ERISA trusts, but no one could seriously argue that they are preempted.

Id. at 1340. *See also Rebaldo, supra*, p. 138-139 ("[I]f ERISA is held to invalidate every state statute which affects the operation of employee benefit plans, those plans will be permitted a charmed existence that was never contemplated by Congress."); and *American Progressive Life & Health Insurance Co. v. Corcoran*, 715 F.2d 784, 787 (2nd Cir. 1983) (Court refuses to preempt state regulation of employee benefit plans where only the administrative costs of the plans were affected).

The majority in the Court of Appeals extends the preemption provision far beyond what Congress intended when it enacted ERISA. As the court in *Aetna Life Insurance, supra*, observed:

> Congress, . . . could not possibly have meant to preempt all laws having any impact on such plans, no matter how small or how tangential.

Aetna Life Insurance Co., supra, at 145.

It is also unlikely that Congress intended to preempt all state prevailing wage laws while preserving federal laws of the same character with respect to plans covered by ERISA. ERISA Section 514(d) provides that "[n]othing in this title [including the ERISA preemption provision] shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States or any rule or regulation issued under any such law."[5] In the context of federal public contracts, the Davis-Bacon Act imposes prevailing wage requirements which, like the New York State requirements, set wage requirements based upon local

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[5] Except as provided in sections 111 [concerning the repeal of the Welfare and Pension Plans Disclosure Act] and 507(b) [concerning authorization for Department of Labor personnel].

considerations.[6]

In light of ERISA Section 514(d) and the Davis-Bacon Act, contributions to ERISA-covered employee benefit plans made by an employer in connection with federal prevailing wage requirements are not affected by ERISA. Indeed, the Court has recognized that, on its face, the Davis-Bacon Act is no more than a federal prevailing wage law designed for the benefit of workers on federal construction projects. *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 772 (1981); *United States v. Binghamton Construction Co.*, 347 U.S. 171, 178, *reh'q denied* 347 U.S. 940 (1954). Congress has indicated no intent to have ERISA preempt long-standing state prevailing wage laws, while leaving federal prevailing wage laws intact. Such a result would severely disrupt "the separate spheres of governmental authority" as to minimum wage laws and would have "far-reaching consequences" of the sort contemplated by the Court in *Morash, supra*.

The majority decision in the Court of Appeals threatens many state laws which Congress could not possibly have intended when it enacted ERISA. The effects of the majority decision will reach far beyond the prevailing wage laws of the State of New York and of the amici states represented herein. Certiorari should be granted in this case so that these troubling, far-reaching effects of the majority's decision are reviewed and ultimately avoided.

II. THE COURT OF APPEALS' ERRONEOUS INTERPRETATION OF SECTION 514 OF ERISA NULLIFIES THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF THE STATE OF NEW YORK AND THREATENS THE EXERCISE OF THE TRADITIONAL POLICE POWERS OF MANY OTHER STATES.

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[6] It should be noted that the Davis-Bacon Act applies to public work projects involving the District of Columbia.

A. The Court of Appeals Misinterpreted Section 514 of ERISA.

The majority in the decision below incorrectly interpreted the provisions of Section 514 of ERISA (Section 514) when it held that Labor Law §220 is preempted by ERISA because it "relates to" ERISA covered employee benefit plans.

Section 514(a) provides, in part:

> [T]he provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . .

Section 514(c)(2) defines the term "State", as it appears in 514(a), to include:

> a state, any political subdivisions thereof or any agency or instrumentality of either which purports *to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.* (Emphasis added.)

In order to interpret the term "relate to," as it applies in Section 514(a), it is crucial to examine the term "State," as defined in Section 514(c)(2). Section 514, when read in full, clearly provides that a state law is not preempted unless it *regulates*, directly or indirectly, an employee benefit plan covered under ERISA. Since Labor Law §220 does not purport to regulate the terms or conditions of ERISA-covered employee benefits plans, directly or indirectly, Labor Law §220 cannot relate to employee benefit plans within the meaning of ERISA.

This Court's reasoning in *Shaw, supra*, illustrates that the majority decision was incorrect. This Court recognized the distinction between those state laws which truly "relate to" employee benefit plans and those state laws which have a purpose unrelated to employee benefit plans and which "affect employee benefit plans in too tenuous, remote or

peripheral a manner to warrant a finding that the law 'relates to' the plan." 463 U.S. at 100 n.21 (1988). This Court's holding in *Shaw, supra,* acknowledges that a state law which regulates an ERISA benefit plan, directly or indirectly, is preempted by ERISA, whereas those laws with an unrelated state purpose and which only remotely affect ERISA covered plans do not "relate" in the sense that they are preempted by ERISA. *Id. See also Rebaldo, supra,* p. 147.

The majority in the Court of Appeals interprets Section 514 in a manner which obscures the purpose of ERISA, and the intent of Congress. As stated in *Rebaldo, supra:*

> ERISA does not invalidate those State statutes whose effect on pension plans is simply tangential in nature. This conclusion follows as a matter of common sense from the fact that ERISA plan members and managers are bound to engage in myriad transactions that Congress never considered when it drafted §514. A preemption provision designed to prevent state interference with federal control of ERISA plans does not require the creation of a fully insulated legal world that excludes these plans from regulation of any purely local transaction.

Id. p. 138. *See also Aetna Life, supra,* p. 145.

B. The Decision of the Court of Appeals Nullifies the Power of the State of New York to Address a Legitimate Local Need.

The majority in the Court of Appeals below misinterpreted Section 514(a) when it held that ERISA "sought to preempt all state laws that relate to an employee benefit plan and not just state laws which purport to regulate an area expressly covered by ERISA". 891 F.2d 25, 29 (2nd Cir. 1989) The majority ignores Section 514(c)(2) and reads Section 514(a) in isolation. Such a reading will broadly sweep away many of the states' traditional police powers which Section 514(c)(2) was undoubtedly designed to protect.

The purpose of each prevailing wage law is to respond to legitimate, purely local needs. One such need involves the state's concern with the employment of its local citizens. The prevailing wage rate set by state statute deters out of state contractors from successfully bidding on state projects and subsequently employing out-of-state employees at a rate of pay lower than the wages prevailing in the locality of the project. It was Congress' intent to leave to the states the authority to promulgate regulations which serve the state's local economic needs. *Morash, supra.* Preemption of Labor Law §220 would infringe upon the State of New York's ability to respond to this legitimate local need.

The exercise of a state's police powers should not be superseded by federal regulations unless that was the clear intent of Congress. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). *See also Rebaldo, supra.* State regulation of labor standards on public work projects is within the traditional police powers exercised by the state. *Fort Halifax Packing Co. Inc. v. Coyne*, 482 U.S. 1 (1987). States possess broad authority under their police powers to regulate the employment relationship with the state. *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724 (1985). Examples of this authority include minimum and other wage laws. *Id. See also Decanas v. Bica*, 424 U.S. 351 (1976). It is clear that New York's prevailing wage law is a valid exercise of the state's traditional police power.

It is clear that Labor Law §220 does not "relate to" employee benefit plans within the meaning of ERISA. The majority in the decision below infringes upon the exercise of New York's traditional police powers and has the potential of causing a similar infringement upon the police powers of the amici states represented herein. Absent a clear expression of intent from Congress, ERISA cannot be construed to preempt wage collection statutes which have only a remote and tenuous connection to employee benefit plans, because these state statutes represent a fundamental exercise of the state's police power. *Morash, supra. See also Gilbert v. Burlington Industries, Inc.* 765 F.2d 320 (2nd Cir. 1985). The dissent in the court below correctly stated that

a state law governing labor costs was not the type of statute that Congress intended to preempt.

The goal of Congress in enacting ERISA was to ensure the uniformity of employee benefit plans so "that employers would not face conflicting or inconsistent state and local regulation of employee benefit plans." *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1 (1987). Neither Labor Law §220, nor the prevailing wage laws of the amici states, do any harm to this goal. Labor Law §220 and the prevailing wage laws threatened by the decision of the Court of Appeals, do not regulate, directly or indirectly, ERISA-covered employee benefit plans.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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